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In The

Supreme Court of the United States

October Term, 1976

No. 76-801

MACK B. RICHMOND,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

BRIEF IN OPPOSITION

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JURISDICTION

The ground for jurisdiction is correctly stated, but should not be exercised in this case.

QUESTION PRESENTED FOR REVIEW

The petition presents only one question for review. Correctly restated that question is: whether the 7th Amendment of the Constitution of the United States and Federal Standards bar any State Appellate Court in an FELA case from reversing a jury verdict on the ground that as a matter of law it is not supported by evidence.

STATEMENT OF THE CASE

Petitioner was the conductor in charge of a shoving movement in the Ronceverte, West Virginia, freight yard of the respondent in which operating Rule 103-A required a man to "be stationed on the leading car * * * in position to be clearly seen to give signals."[1] Petitioner conceded that he chose to ride on the brake platform of the lead car, where he admittedly could not be seen to give signals, because that place was more comfortable than the proper place where he could be seen for that purpose and also because he did not think it necessary to so station himself in that area where nothing could happen. When he figured that he was getting up pretty close to a pedestrian cross-walk where he might have to give a signal, he suddenly undertook to make a move to get where he could be seen to give signals in compliance with that rule.

Safety Rule 182, well known to and understood by the petitioner, required employees to "maintain a lookout in the direction of movement to avoid coming in contact * * * with cars, locomotives, or trains on adjacent track."[2] Rule 182 also provided that "where vision is obscured, or location is indefinite, they will keep in the clear."

Petitioner undertook to move from the brake platform around the southeast corner of the boxcar being pushed eastward at the exact moment he was about to pass a hopper car on an adjacent track. Though he had previously seen that hopper car on that track and knew it was there, he failed to keep any lookout whatever and as he started to move instantly struck the northwest corner of that car with his right shoulder. The petitioner repeatedly could

[1] Appendix with Petition, p. 25a.

[2] Appendix with Petition, p. 26a.

not explain why he kept no lookout and failed to see the hopper car until he struck it.[3]

The trial court overruled respondent's motions to strike the evidence and for summary judgment, submitted the case to a jury which awarded a verdict of $125,000, and entered judgment thereon notwithstanding respondent's motion n.o.v.

The Supreme Court of Virginia found "as a matter of law that Richmond's independent and negligent act was the sole cause of the accident and his injuries. No negligence of the C&O was shown that contributed in whole or in part to the accident."[4]

THERE IS NO REASON TO GRANT CERTIORARI

Petitioner presents only one question: the claimed effect of the 7th Amendment of the Constitution and Federal Standards for construing the FELA. The 7th Amendment forbids the *re-examination* of jury findings on evidence before it *otherwise* "than according to the rules of the common law." The FELA recognizes, as no court has ever doubted, that a *causative* relation of the employer's negligence, "even the slightest," is the necessary and indispensable essential to establish liability. *Rogers* v. *Missouri Pacific R. Co.* (1957), 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443; *Inman* v. *B&O R. Co.* (1959), 361 U.S. 138, 4 L.Ed.2d 198, 80 S.Ct. 242; *Moore* v. *Chesapeake and Ohio Rwy. Co.* (1951), 340 U.S. 573, 95 L.Ed. 547, 71 S.Ct. 428; *Brady* v. *Southern R. Co.* (1943), 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232; *Herdman* v. *Pennsylvania R. Co.* (1957), 352 U.S. 518, 1 L.Ed.2d 508, 77 S.Ct. 455; *Eckenrode* v. *Penn-*

[3] Appendix with Petition, pp. 26a-27a.

[4] Appendix with Petition, p. 32a.

sylvania R. Co. (1948), 335 U.S. 329, 93 L.Ed. 41, 69 S.Ct. 91

The right of all courts to determine as a matter of law whether there is evidence requiring the submission of a case to a jury is a specific part of the common law. That is the appropriate test specifically recognized by this Court in FELA cases. *Rogers* v. *Missouri Pacific R. Co., supra.* None of the decisions cited at pages 9 and 10 of the petition holds otherwise.

This Court has frequently avoided consideration of the current question by undertaking to follow traditional practice to refuse decision of constitutional questions when the record discloses other grounds of decision. See *Grunenthal* v. *Long Island R.R. Co.* (1968), 393 U.S. 156, 21 L.Ed.2d 309, 89 S.Ct. 331; *Neese* v. *Southern R. Co.* (1955), 350 U.S. 77, 100 L.Ed. 60, 76 S.Ct. 131. The Court may profitably do so in this case because the record plainly discloses that the ultimate conclusion of the Supreme Court of Virginia was correctly reached according to the rules of the common law and the standards of this Court under the FELA:

> "We conclude that the evidence established as a matter of law that Richmond's independent and negligent act was the sole cause of the accident and his injuries. No negligence of the C&O was shown that contributed in whole or in part to the accident."[5]

This Court refused certiorari in an exactly similar situation in which the Supreme Court of Virginia reversed a jury verdict approved by the trial court in *Southern Railway Co.* v. *Mays* (1951), 192 Va. 68, 63 S.E.2d 720, cert. denied 342 U.S. 836, 96 L.Ed. 632, 72 S.Ct. 60.

In the case at bar there are the inescapable admissions of the petitioner that he, as the conductor in charge of the

[5] Appendix with Petition, p. 32a.

movement, had assigned himself the primary duty pursuant to Rule 182 "to maintain a lookout in the direction of movement to avoid coming in contact * * * with cars, locomotives, or trains on adjacent track" and when the situation is indefinite "to keep in the clear."[6] Richmond conceded that he was the "first eyes" of the movement responsible to accomplish that purpose and that he utterly failed in that respect.

It was Richmond's specific failure to see and "keep clear" of the conditions relied on to establish C&O negligence as a contributing cause that was the sole cause of his injury. Without his affirmative act in moving from a position of safety to one which at the specific moment involved danger solely because it was negligently not seen by him, the accident could not have occurred.

A careful study of the whole record in this case will also quite clearly illustrate the brazen arrogance with which designated regional counsel of the Union employ reprehensible means, definitely not "according to the rules of the common law," in their efforts to influence juries and courts that "notoriously" in their opinion refuse to be dominated by such practices in the effort to turn the FELA into liability without fault.

It is unnecessary to grant certiorari in this case because the ultimate decision by the Virginia Supreme Court was plainly correct "according to the rules of the common law" as well as to the standards laid down by this Court for the review of judgments in FELA cases.

CONCLUSION

The petition for certiorari should be denied because the decision as a matter of law by the Supreme Court of Vir-

[6] Appendix with Petition, pp. 26a-27a.

ginia that Richmond's negligence is the only proximate cause of his injury is the only fact that as a matter of law can be found on the evidence so reexamined "according to the rules of the common law."

Respectfully submitted,

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